

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION**

SMITH COUNTY,
Petitioner

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CIVIL ACTION NO. 6:21cv232

**PETITIONER SMITH COUNTY'S VERIFIED PETITION
TO PERPETUATE TESTIMONY**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Petitioner, **SMITH COUNTY, TEXAS**, and files this its Verified Petition to Perpetuate Testimony, and in support thereof, would respectfully show unto the Court the following:

Petitioner asks the Court for permission to take a deposition by oral examination to perpetuate the testimony of former Smith County Sheriff J.B. Smith, for use in an anticipated lawsuit, as authorized by F.R.C.P. 27, as shows as follows:

I. Introduction

- A. Petitioner is Smith County, Texas.
- B. The Court has jurisdiction over this petition, as suit was previously filed in the Tyler Division of the Eastern District of Texas in Civil Action No. 6:17cv00333-RWS, based on 28 U.S.C. § 1331.
- C. Attached as Exhibit "A" is the Affidavit of Chad Rook, which supports and proves the allegations herein.

II. Prior Lawsuit

- D. Civil Action No. 6:17cv00333-RWS was filed in the Tyler Division on 6/5/17.

Subsequently, on 9/18/18, the Court entered a Memorandum Opinion and Order, granting summary judgment for Defendants as to Plaintiff Kerry Max Cook's state law claims¹ and denying summary judgment on Cook's § 1983 claims.² The Court determined that the § 1983 claims were not timely because they "will not begin to accrue until the [Texas] Court of Criminal Appeals vacates Cook's conviction and the State dismisses the charges."³ Thereafter, the Court entered an Order Granting Motion to Dismiss, dismissing with prejudice all claims until the *Heck* conditions are met.⁴ In short, it is anticipated that once the conditions referenced above are met, Cook will then re-file his civil action.

E. All of the persons and entities sued in Case No. 6:17cv00333-RWS may have an interest in this Petition, and they and their counsel in the prior litigation are as follows:

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COUNSEL FOR CITY DEFENDANTS:

City of Tyler
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Eric Liptak
Robert Bond
Gerald Hayden
Nelson Downing
Fred Mayo
Kenneth Findley
Ronald Scott

¹ Dkt. 89 at 23; Case No. 6:17cv00333-RWS.

² *Id.* at 16-17.

³ *Id.*

⁴ Dkt. 95; Case No. 6:17cv00333-RWS.

Jimmy Toler

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COUNSEL FOR PLAINTIFF:
Kerry Max Cook

The following individuals were named in the prior litigation, but never served with process and never made an appearance. It is believed that some or all of these individuals are deceased:

Douglas Collard
Ronnie Malloch
Sutart Dowell
Jake Massey
Gene Carlson

III. Request to Depose

F. Petitioner respectfully asks the Court to issue an Order authorizing it to take the oral deposition of J.B. Smith, the former Sheriff of Smith County during all times relevant to the claims made by Cook. Sheriff Smith has knowledge of Smith County's involvement and/or lack thereof with Cook, including the murder investigation and incarceration of Cook.

G. Petitioner needs to perpetuate the testimony of J.B. Smith because, due to the passage of time,⁵ most of the Smith County employees with relevant knowledge have either passed away or are no longer able to serve as witnesses due to their age and mental capacity. Former Sheriff Smith has the most knowledge on behalf of the County, and given the uncertainty over when the Court of Criminal Appeals may rule, the County needs to preserve his testimony.

H. J.B. Smith does not oppose giving his deposition and, in fact, is agreeable to doing

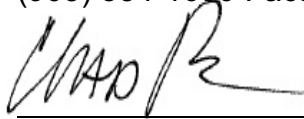
⁵ The murder occurred in 1977.

so. Request is made that his deposition be conducted within the next sixty days.

WHEREFORE, PREMISES CONSIDERED, Petitioner requests the Court for permission to take a deposition by oral examination to perpetuate the testimony of former Smith County Sheriff J.B. Smith and to issue an Order authorizing it to take the oral deposition for J.B. Smith, the former Sheriff of Smith County, as soon as possible but within at least the next sixty (60) days.

Respectfully submitted,

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CHAD C. ROOK
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**ATTORNEY FOR PETITIONER,
SMITH COUNTY, TEXAS**

CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing instrument was served upon all counsel of record in the above entitled and numbered cause on June 10, 2021, in the following manner:

 X Via Email



CHAD C. ROOK

CERTIFICATE OF CONFERENCE

Roshna Keen, who is counsel for Kerry Max Cook was contacted on 6/9/21 and 6/10/21 and indicated she does not oppose this Petition if Smith County will in turn not oppose Cook taking the depositions of former City of Tyler defendants Eddie Clark and Eric Liptak, as well as fact witnesses Frederick Mears and Edward Jackson. Smith County does not oppose depositions of Mears and Jackson, who are not former defendants in the case, but will only be unopposed to Clark and Liptak depending upon the position of the City of Tyer - so for that reason there may not be complete agreement with counsel for Kerry Max Cook. Counsel for the City of Tyler Defendants, Keith Dolohite, was contacted on 6/3/21 and indicated he does not oppose this Petition. Christopher Lindsey, who is counsel for Martin T. McLeroy, was contacted on 6/9/21 and indicated he does not oppose this Petition.

A handwritten signature in black ink, appearing to read 'Chad R', is written over a horizontal line.

CHAD C. ROOK